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AF Holdings, L.L.C.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

10 AF HOLDINGS, L.L.C., a St. Kitts and Nevis
limited liability company,

CASE NO.:2:12-CV-02127-PHX-JWS

11 Plaintiff,

V.

ANDREW GUTIERREZ

Defendant:

**PLAINTIFF'S RESPONSE TO ORDER
TO SHOW CAUSE (EFC NO. 10)**

Plaintiff AF Holdings, L.L.C. (“Plaintiff”), through its undersigned counsel, hereby responds to this Court’s Order of February 1, 2013 (ECF No. 10) to show cause why this matter should not be dismissed for failure to serve the Defendant, Andrew Gutierrez within the time prescribed by Rule 4(m), as follows:

I. LEGAL STANDARD

Rule 4(m) requires a court to extend a plaintiff's time for serving the complaint if plaintiff can establish good cause. *In re Sheehan*, 253 F.3d 507, 512 (9th Cir. 2001). Absent a showing of good cause, Rule 4(m) permits a court to exercise its discretion to extend the time for service.

1 Plaintiff can establish good cause and the history of this case weighs in favor of the Court exercising
 2 its discretion to extend the time for service.

3 II. BACKGROUND

4 Plaintiff filed its Complaint on October 9, 2012 against Defendant. (ECF No. 1.) The
 5 Summons against Defendant was issued on October 9, 2012. (ECF No. 5.) On October 19, 2012, the
 6 case was assigned to the Honorable John W. Sedwick. On January 10, 2013, Judge Sedwick ordered
 7 the Plaintiff to show cause for the failure to timely serve the Defendant. (ECF No. 10.)

8 III. GOOD CAUSE

9 “When considering [whether] ... to dismiss a complaint for untimely service, courts must
 10 determine whether good cause for the delay has been shown on a case by case basis.” *In re Sheehan*,
 11 253 F.3d at 512. The Ninth Circuit has recognized that, “at a minimum, good cause means
 12 excusable neglect.” *Id.* (citation omitted.) In *Boudette v. Barnette*, the Ninth Circuit added that “[a]
 13 plaintiff may also be required to show the following: (a) the party to be served personally received
 14 actual notice of the lawsuit; (b) the defendant would suffer no prejudice; and (c) plaintiff would be
 severely prejudiced if his complaint were dismissed.” *Boudette v. Barnette*, 923 F.2d 754, 756 (9th
 Cir. 1991) (citing *Hart v. United States*, 817 F.2d 78, 80-81 (9th Cir. 1987)).

15 Good cause exists because despite attempts to serve the Defendant on five (5) separate
 16 occasions, Plaintiff’s process server was unable to serve him. Plaintiff believes that the Defendant is
 17 deliberately avoiding service, so Plaintiff has hired a new process server to attempt to effectuate
 18 service; but if those efforts fail, Plaintiff will file a motion for serve the Defendant by alternative
 19 means. The Declaration of Steven James Goodhue, Attorney for Plaintiff is attached hereto as
 Exhibit A.

20 The “excusable neglect” standard would appear to be readily satisfied. As shown above,
 21 Plaintiff has demonstrated that it acted swiftly to serve the Defendant and inform him of the claims
 22 against him. Furthermore, Plaintiff has shown that it made consistent, good faith effort to serve the
 23 Defendant.

IV. DISCRETION

Even if the Court concludes that Plaintiff does not have good cause, it should nevertheless exercise its discretion to extend time for service, to allow Plaintiff to continue with its efforts to serve the Defendant with the new process server. These factors weigh heavily in favor of the Court exercising its discretion to extend the time for serving the Complaint.

V. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court extend Plaintiff's time for service of the complaint.

Dated this 6th day of February, 2013

Law Offices of Steven James Goodhue

By: /s/ Steven James Goodhue
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I hereby certify that on February 6, 2013, I electronically filed the foregoing with the Clerk of the Court for filing and uploading to the CM-ECF system which will send notifications of such filing to all parties of record.

/s/ Steven James Goodhue